Allianz General Insurance Co (M) Bhd v Ketua Pengarah Hasil Dalam Negeri

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-346–07 OF 2020
LEE SWEE SENG, LEE HENG CHEONG AND HASHIM HAMZAH JJCA
8 APRIL 2022

Civil Procedure — Judicial review — Application for leave — Appellant applied for leave to commence judicial review proceeding against respondent — Respondent issued notice of reduced assessment and notice of additional assessment to appellant — Whether availability of alternative remedy that had not been exhausted by appellant would bar appellant from obtaining leave

This was an appeal by the appellant against the decision of the learned High Court judge ('HCJ') who dismissed the appellant's application for leave to commence a judicial review proceeding against the respondent. The appellant, a taxpayer, was a company incorporated in Malaysia and its principal activity is the underwriting of all classes of general insurance business. The appellant was licensed by Bank Negara Malaysia. Allianz SE General Reinsurance Branch Labuan ('Labuan Branch') was duly registered as a foreign offshore company under the Labuan's Companies Act 1990. The respondent conducted a tax audit on the appellant and found that the 5% reinsurance premium paid by the appellant to the Labuan Branch was not deductible since the Labuan Branch did not have any economic substance. The Labuan Branch was regarded by the respondent as a foreign reinsurer. The appellant was dissatisfied with the notice of reduced assessment and notice of additional assessment that was issued by the respondent to the appellant, in which the appellant was required to pay penalties. The appellant maintained that the Labuan Branch was a legal company in Labuan under s 2 of the Labuan Business Activity Tax Act 1990 and was not required to have a physical presence in Labuan. The learned HCJ dismissed the appellant's application for leave on the grounds that there were disputes on facts that should be referred to the Special Commissioner of Income Tax ('SCIT') for determination, and that there were no exceptional circumstances to warrant the grant of leave since the alternative remedy of statutory appeal provided under s 99 of the Income Tax Act 1967 was available to the appellant. Hence, this appeal.

Held, allowing the appeal with costs:

(1) It was trite that mere availability of alternative remedy, for instance, by way of statutory appeal to the SCIT in the present case, did not

automatically oust the power of the courts to hear the judicial review application. The discretion to grant leave still laid with the courts. However, the discretion should be exercised in very exceptional circumstances, for instance: (a) clear lack of jurisdiction; (b) blatant failure to perform a statutory duty; or (c) breach of the principles of natural justice. This was best decided during the substantive stage of the judicial review proceeding. The appellant had successfully shown that it had an arguable case to be addressed at the substantive stage of the judicial review proceeding. Thus, it could not be said that the appellant's application for leave was frivolous or vexatious. It was also trite that the threshold in granting leave was relatively low as long as the strict requirements under O 53 of the Rules of Court 2012 had been complied with. The appellant had successfully passed the threshold to be granted leave to commence judicial review proceeding against the respondent. The learned trial judge had erred in holding otherwise (see paras 12–13, 17, 22 & 25).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan hakim Mahkamah Tinggi ('HMT') yang bijaksana yang menolak permohonan perayu untuk mendapatkan kebenaran untuk memulakan prosiding semakan kehakiman terhadap responden. Perayu, seorang pembayar cukai, adalah sebuah syarikat yang diperbadankan di Malaysia dan aktiviti utamanya ialah perniagaan pengunderaitan semua kelas insurans am. Perayu telah dilesenkan oleh Bank Negara Malaysia. Allianz SE General Reinsurance Branch Labuan ('Cawangan Labuan') telah didaftarkan dengan sewajarnya sebagai syarikat luar pesisir asing di bawah Akta Syarikat Labuan 1990. Responden telah menjalankan audit cukai ke atas perayu dan mendapati insurans semula premium 5% dibayar oleh perayu kepada Cawangan Labuan tidak boleh ditolak kerana Cawangan Labuan tidak mempunyai sebarang unsur ekonomi. Cawangan Labuan telah dianggap oleh responden sebagai penanggung insurans semula asing. Perayu tidak berpuas hati dengan notis pengurangan taksiran dan notis taksiran tambahan yang telah dikeluarkan oleh responden kepada perayu, di mana perayu dikehendaki membayar penalti. Perayu menegaskan bahawa Cawangan Labuan adalah sebuah syarikat sah di Labuan di bawah s 2 Akta Cukai Aktiviti Perniagaan Labuan 1990 dan tidak dikehendaki mempunyai kehadiran fizikal di Labuan. HMT yang bijaksana menolak permohonan perayu untuk mendapatkan kebenaran atas alasan bahawa terdapat pertikaian mengenai fakta yang harus dirujuk kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') untuk penentuan, dan bahawa tidak ada keadaan luar biasa untuk menjamin pemberian kebenaran memandangkan remedi alternatif rayuan berkanun yang diperuntukkan di bawah s 99 Akta Cukai Pendapatan 1967 tersedia kepada perayu. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Adalah tetap bahawa ketersediaan remedi alternatif semata-mata, misalnya, melalui rayuan berkanun kepada SCIT dalam kes ini, tidak secara automatik menghilangkan kuasa mahkamah untuk mendengar permohonan semakan kehakiman. Budi bicara untuk memberikan kebenaran masih terletak pada mahkamah. Walau bagaimanapun, budi bicara harus dilaksanakan dalam keadaan yang sangat luar biasa, contohnya: (a) kekurangan bidang kuasa yang jelas; (b) kegagalan secara terang-terangan untuk melaksanakan kewajipan berkanun; atau (c) pelanggaran prinsip keadilan semula jadi. Ini paling baik diputuskan semasa peringkat substantif prosiding semakan kehakiman. Perayu telah berjaya menunjukkan bahawa ia mempunyai kes yang boleh dipertikaikan untuk ditangani pada peringkat substantif prosiding semakan kehakiman. Oleh itu, tidak boleh dikatakan bahawa permohonan perayu untuk mendapatkan kebenaran adalah remeh atau menyusahkan. Ia juga tetap bahawa ambang dalam pemberian kebenaran adalah agak rendah selagi keperluan ketat di bawah A 53 Kaedah-Kaedah Mahkamah 2012 telah dipatuhi. Perayu telah berjaya melepasi ambang untuk diberi kebenaran untuk memulakan prosiding semakan kehakiman terhadap responden. Hakim bicara yang bijaksana telah terkhilaf dalam menyatakan sebaliknya (lihat perenggan 12–13, 17, 22 & 25).]

Cases referred to

Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2021] MLJU 1229; [2021] 9 CLJ 918, HC (refd)

Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (No 25–101–05 of 2013) (unreported), HC (refd)

George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors [1988] 1 MLJ 319; [1987] 1 LNS 111 (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185; [1987] CLJ Rep 110, SC (folld)

Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2019] 5 MLJ 236, CA (refd)

IRC v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, HL (refd)

Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd [2017] 2 MLJ 197; [2017] 5 CLJ 283, CA (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)

Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors and another appeal [2014] 4 MLJ 377; [2014] 3 CLJ 733, CA (refd)

QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; [2006] 2 CLJ 532, CA (refd)

R v Secretary of State for the Home Department, ex parte Rukshanda Begum [1990] COD 107, CA (refd)
Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555; [2008] 6 CLJ 235, CA (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 927, CA (refd)
Teh Guat Hong lwn Perbadanan Tabung Pendidikan Tinggi Nasional [2013] 1 LNS 1465 (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442; [1995] 3 CLJ 627, SC (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)
YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor [2003] 5 MLJ 128; [2003] 1 CLJ 210, HC (refd)

Legislation referred to

Income Tax Act 1967 s 99
Labuan Business Activity Tax Act 1990 ss 2, 2B
Labuan Companies Act 1990
Rules of Court 2012 O 53

Appeal from: Civil Suit No WA-25–1–01 of 2020 (High Court, Kuala Lumpur)

S Saravana Kumar (with Ng Kar Ngai) (Rosli Dahlan Saravana Partnership) for the appellant.
Krishna Priya a/p Veenagopal @ Venugopal (with Mohammad Danial bin Ahmad and Ahmad Isyak bin Mohd Hassan) (Attorney General's Chambers) for the respondent.

Hashim Hamzah JCA:

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the learned High Court Judge ('HCJ') on 20 July 2020 who dismissed the appellant's application for leave to commence a judicial review proceeding against the respondent. At the hearing before the High Court, the application for leave was opposed by the attorney general ('AG') and the putative respondent.

BACKGROUND FACTS

[2] Briefly, the background facts leading to the present appeal are as follows. The appellant, a taxpayer, is a company incorporated in Malaysia and its principal activity is the underwriting of all classes of general insurance business.

The appellant was licensed by Bank Negara Malaysia. Allianz SE General Reinsurance Branch Labuan ('Labuan Branch') is duly registered as a foreign offshore company under the Labuan Companies Act 1990 ('the LCA 1990') (formerly known as the Offshore Companies Act 1990).

[3] The respondent conducted a tax audit on the appellant and found that the 5% reinsurance premium paid by the appellant to the Labuan Branch is not deductible since the Labuan Branch did not have any economic substance. The Labuan Branch was regarded by the respondent as a foreign reinsurer.

[4] The appellant was dissatisfied with the notice of reduced assessment dated 24 December 2019 and notice of additional assessment dated 26 December 2019 that was issued by the respondent to the appellant, in which the appellant was required to pay penalties amounting to RM894,674.75 for Year Assessment ('YA') 2013 and RM4,304,879.34 for YA 2014. The appellant maintained that the Labuan Branch is a legal company in Labuan under s 2 of the Labuan Business Activity Tax Act 1990 ('the LBATA 1990') and was not required to have a physical presence in Labuan.

[5] The learned HCJ dismissed the appellant's application for leave on the grounds that there were disputes on facts that should be referred to the Special Commissioner of Income Tax ('SCIT') for determination, and that there were no exceptional circumstances to warrant the grant of leave since the alternative remedy of statutory appeal provided under s 99 of the Income Tax Act 1967 ('the ITA 1967') was available to the appellant.

THE APPELLANT'S SUBMISSION

[6] In short, it was submitted by learned counsel for the appellant that:

(a) the issue of alternative remedy should not be raised at the leave stage;

(b) the existence of a domestic remedy does not bar a judicial review;

(c) there was a clear lack of jurisdiction and error of law committed by the respondent; and

(d) the appellant's application satisfies the relatively low threshold for granting leave.

THE ATTORNEY GENERAL'S AND PUTATIVE RESPONDENT'S CONTENTION

[7] Basically, it was submitted by both learned federal counsel ('FC') for the AG and learned revenue counsel for the putative respondent that:

A (a) the leave application was frivolous, vexatious, or otherwise an abuse of the court's process since the appellant had yet to exhaust its right to appeal to the SCIT under the ITA 1967; and

(b) there were no exceptional circumstances for the court to grant leave for judicial review.

B

FINDINGS

[8] The primary issue for consideration in the present case is whether the C availability of an alternative remedy that has not been exhausted by the appellant would bar the appellant from obtaining leave to commence judicial review proceedings against the respondent.

[9] Regarding this issue, we are primarily guided by what has been decided D by the Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110 through Hashim Yeop A Sani SCJ (as he then was) in the following words:

> A clear principle is reiterated here ie *it is not a rigid rule that whenever there is an* E *appeal procedure available to the applicant he should be denied judicial review*. Judicial review is always at the discretion of the court but *where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances*.
>
> ...
>
> F In answer to the first question we would therefore hold that the discretion is still with the courts but where there is an appeal provision available to the applicant certiorari should not normally issue *unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice*. (Emphasis added.)

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[10] See also *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235 (CA), and *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197; [2017] 5 CLJ 283 (CA).

H

[11] What amounts to very exceptional circumstances 'must necessarily depend on the factual matrix of each case'. This court in *Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2019] 5 MLJ 236 through Abdul Rahman Sebli JCA (as he then was) held:

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> [17] Exceptional means 'unusual; not typical': see *Concise Oxford English Dictionary* (11th Ed). *Very exceptional circumstances therefore means very unusual circumstances*. What amounts to very unusual circumstances *must depend on the factual matrix of each case*. (Emphasis added.)

[12] It is therefore trite that mere availability of alternative remedy, for instance, by way of statutory appeal to the SCIT in the present case, does not automatically oust the power of the courts to hear the judicial review application. The discretion to grant leave still lies with the courts. However, the discretion should be exercised in very exceptional circumstances, for instance: (a) clear lack of jurisdiction; (b) blatant failure to perform a statutory duty; or (c) breach of the principles of natural justice.

[13] In our considered view, this is best decided during the substantive stage of the judicial review proceeding. In *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65, the Federal Court through Edgar Joseph Jr FCJ (as he then was) held:

> Before considering this question, we should like to make a preliminary observation regarding *the stage at which the question of alternative remedies should be dealt with. There is no hard and fast rule about this*. As we have said, the case of *R v Secretary of State for the Home Department ex parte, Swati* shows that the existence of alternative remedies would be a ground for refusing leave to apply for judicial review. It is also a ground for setting aside a grant of leave given earlier (*R v Secretary of State for the Home Department ex parte Davendranath Doorga* [1990] COD 109). Again, the alternative remedies argument may be considered at the inter partes stage, even if leave had been granted and not challenged (*R v Brentford General Commissioners, ex parte Chan* [1986] STC 65. *At the final hearing stage, the court can consider the alternative remedies objection as a preliminary point* (*R v Chief Adjudicating Officer, ex parte Bland*, The Times 6 February 1985) *or at a later stage* (see, eg *R v Epping and Harlow General Commissioners, ex parte Goldstraw* [1983] 3 All ER 257). (Emphasis added.)

[14] Next, it was submitted by learned counsel for the appellant that leave for judicial review ought to be granted in the present case. According to learned counsel for the appellant, the respondent in disallowing the 5% reinsurance premium paid as a deduction had committed a serious error of law which in turn resulted in a clear lack of jurisdiction in its decision.

[15] Firstly, it was submitted that the respondent failed to consider that the Labuan Branch which has been duly registered as a foreign offshore company under the LCA 1990 is, by definition under the Labuan Business Activity Tax Act 1990 ('the LBATA 1990'), a legal 'Labuan Company'. Secondly, it was submitted that the respondent had disregarded or failed to adhere to legal principles established by the High Court in *Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (No 25–101–05 of 2013) (unreported) (see also *Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2021] MLJU 1229; [2021] 9 CLJ 918). Thirdly, it was submitted that the respondent failed to consider that the new s 2B of the LBATA 1990 pertaining to the new requirements of economic substance for Labuan companies only took effect

from the year 2019 onwards and does not apply retrospectively to the YAs in dispute.

[16] On the other hand, it was contended by the AG and the putative respondent that the appellant failed to show any exceptional circumstances which would justify the grant of leave. It was further contended that the issues raised were issues of facts that should have been ventilated and exhausted before the SCIT through the available procedures under the ITA 1967.

[17] On this issue, we are of the considered view that without delving into the merits of the case, and upon perusal of the available material on the face of it, the appellant had successfully shown that it had an arguable case to be addressed at the substantive stage of the judicial review proceeding. Thus, it cannot be said that the appellant's application for leave is frivolous or vexatious.

[18] Suriyadi Halim Omar FCJ (as he then was) in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478 (FC), in delivering the judgment of the Federal Court held as follows:

> [12] For purposes of its application, the appellant had alluded to the statutory route of O 53 of the Rules. Under this order two stages are anticipated, with the leave stage being the first, to be followed closely by the substantive hearing after successfully obtaining leave at the High Court. *At the leave stage, on a quick perusal of the material available, if the court thinks that subsequently at the substantive hearing stage an arguable case may be disclosed, and the relief sought may be granted, leave should be granted* (*IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617). In Malaysia, the Federal Court in *Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68; [1983] 1 CLJ 130; [1983] CLJ Rep 271 when allowing the appeal, opined that 'the point taken was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari'. Without the need to go into depth of the abundant authorities, *suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome*. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged. (Emphasis added.)

[19] In the Supreme Court case of *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442; [1995] 3 CLJ 627, Edgar Joseph Jr SCJ (as he then was) cited with approval the case of *R v Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] COD 107 and held:

> In *R v Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] COD 107, the Court of Appeal in England correctly laid down guidelines to be followed by the court when considering an application for leave, in the following terms:

(a) *The judge should grant leave if it is clear that there is a point for further investigation on a full inter partes basis* with all such evidence as is necessary on the facts and all such argument as is necessary on the law.

(b) If the judge is satisfied that there is *no arguable case he should dismiss the application for leave* to move for judicial review.

(c) If on considering the papers, the judge comes to the conclusion that he really *does not know whether there is or is not an arguable case*, the right course is for the judge to *invite the putative respondent to attend and make representations* as to whether or not leave should be granted. *That inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing*. The test to be applied by the judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award, ... namely: *if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave*. (Emphasis added.)

[20] In *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 927, this court through Gopal Sri Ram JCA (as he then was) had cited with approval the following authorities, namely *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, *George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors* [1988] 1 MLJ 319; [1987] 1 LNS 111, and *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor* [2003] 5 MLJ 128; [2003] 1 CLJ 210 to conclude that:

> [10] To paraphrase in less elegant language what has been said in these cases, *the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous*. If, for example, the applicant is a busybody, or the application made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg, proceedings in Parliament (see art 63 of the Federal Constitution). (Emphasis added.)

[21] Similarly, this court in *Teh Guat Hong lwn Perbadanan Tabung Pendidikan Tinggi Nasional* [2013] 1 LNS 1465 through Varghese George Varughese JCA (as he then was) explained:

> It is trite that the 'leave' proceedings are intended to sieve out unwanted or frivolous applications before it moves to the substantive stage of proceedings. *The assistance required by the court from the Attorney-General's Chambers at this stage, in that context, was to appraise the court of any particular features of the case that would disqualify any leave being granted to the applicant concerned. It was not for the chambers at this preliminary stage, in my view, to embark upon substantive submission on the jurisdiction of the court to entertain such an application*. (Emphasis added.)

[22] It is also trite that the threshold in granting leave is relatively low as long as the strict requirements under O 53 of the Rules of Court 2012 ('the ROC 2012') have been complied with.

[23] Abang Iskandar JCA (now CJ Sabah and Sarawak) in *Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors and another appeal* [2014] 4 MLJ 377; [2014] 3 CLJ 733 held:

> [9] The law in this regard is trite. *Granted that the threshold upon which leave may be granted is not necessarily high, nevertheless adherence to its stated requirements as contained in O 53 have been strictly enforced by the courts*. We are aware that the threshold requirement for leave to issue had been reiterated in the case of *Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim* [2011] 6 MLJ 490; [2012] 1 CLJ 805 in that in order to be successful, the application must not be one that is frivolous or vexatious and that it justifies further argument on the substantive motion. (Emphasis added.)

[24] In *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532, Gopal Sri Ram JCA (as he then was) in delivering the judgment of this court held as follows:

> Historically speaking, the requirement of standing to approach a court for judicial review was one that was established by the courts *to keep our litigants who had no legitimate grievance against the administrative arm of the State*. The object was to prevent them from crossing the threshold of the courts of justice. This requirement established by judges for themselves that *only those with a legitimate grievance may cross the threshold and enter the court is what is known as 'threshold locus standi'. It is quite different of 'substantive locus standi' which falls to be determined by court at the very end of the case when it comes to decide whether on the facts and circumstances* discretion ought to be exercised in the applicants favour (see *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177; [1982] 1 LNS 2). (Emphasis added.)

[25] Based on all of the above, we found that the appellant had successfully passed the threshold to be granted leave to commence judicial review proceeding against the respondent. We found that the learned trial judge had erred in holding otherwise.

CONCLUSION

[26] In conclusion, for the reasons enumerated above, we found merits in the appeal. Our decision is unanimous. The appeal is allowed with costs in the cause. The decision of the High Court is set aside. We grant leave applied for and the matter is remitted back to the High Court for case management.

Appeal allowed with costs.

Reported by Nabilah Syahida Abdullah Salleh